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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. Eric Waldenberg, an individual, Appellant.	NO. 42026-1-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Eric Waldenberg, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not address in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

The additional grounds I pray the Appellate Court consider are as follows:

1. Vagueness or lack of clear intent of the Jefferson County Drug Court Law.
2. Does the defendant have a minumum guarantee of right to due process?
3. Does the Equal Protection Clause apply to the defendant in this case?

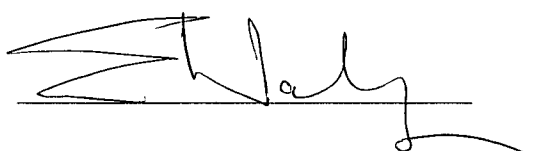
4. How does the recent elimination of the Sentencing Guideline Commission affect this case?
5. Should the presiding trial court Judge determine "offender score" rather than the prosecution?
6. Are there options available to the trial court and the Appellate Court besides prison?

The attached memorandum addresses these questions in detail. I have tried to limit the amount of statutory and case law. However, it is difficult to make the qrounds I respectfully ask for review by the Appellate Court. In addition, it is even more difficult to explain my understanding which has come from much research without name the source law. Please forgive any errors I have made. I have read every statute and case I sight and believe that I have grounds for each argument I make.

I was relieved to recieve this request from the Court because it appeared to me that without further discussion and review by the Appellate Court I would not have a chance at receiving a fair and unbiased examination of my case and the possibilities that may exist to keep me from prison. I experience something in prison from studid mistakes I made in 2003 and they have been vervently brought up over and over again by the prosecution, sometimes with no truth or verification. With the refusal of my attorney(s) to bring this proof forward, and place it in the court record I very little hope. Now, at least I know that these truths can come forward and be considered. If I am right and the arguments have some merit, perhaps I have a chance at life.

Thank you in advance for your consideration of these matters.

Signed this 18 day of February, 2012.



ERIC WALDENBERG, APPELLANT

MEMORANDUM

To: The Court Of Appeals,
Division Two of the State of Washington

From: Appellant, Eric O. Waldenberg (Ex Parte)

Re: Appellate Court's Request for Additional Grounds for Review - No. 42026-1-II

Date: February 12, 2012 - Please see attached cover sheet explaining late filing

ISSUES

1. Does the vagueness or lack of clear intent of a statute or regulation affect the constitutionality of same?
2. Is the right to due process guaranteed to a defendant seeking alternative sentencing?
3. Does the Constitutional Equal Protection Clause apply to a defendant seeking alternative sentencing?
4. Do the recent changes to the sentencing guidelines commission affect the sentencing discretion of the trial court?
5. Should the presiding judge determine the offender's score, not the prosecution?
6. Are other options available to the appellate court?

BRIEF ANSWERS

1. Yes. The Washington State Constitution, Article I, Section 3, and the Fourteenth Amendment to the United States Constitution, both claim that a statute (appellant assumes Jefferson County's drug court is established by statute) is void for vagueness if: 1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prescribed; or 2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. This vagueness test serves two purposes. First, it ensures that citizens receive fair warning of what contact they must avoid, and, second, it protects citizens from "arbitrary, ad hoc, or discriminatory law enforcement." A statute is unconstitutionally vague if either requirement is not satisfied. The language contained in the Jefferson County drug court policy is vague enough that the appellant's attorney, the prosecution, and the judge interpreted the law differently. I will respectfully ask the Court in my subsequent analysis to review part 2 of the vagueness test.
2. Yes. The U.S. and Washington State Constitutions guarantee due process when a person's liberty is at stake. Even more specifically in my case, because chemical dependency and mental health issues exist and were part of the crime, RCW 10.05.020 is applicable. Paragraph 1 states that "the petitioner shall allege under oath in the petition, that the wrongful conduct charge is the result of or caused by alcoholism, drug addiction, or mental problems, for which the person is in need of and unless treated, the probability of future recurance is great....." Further, "the petition shall also contain a case history and written assessment prepared by an approved alcoholism treatment program as designated in chapter 70.96A

RCW if the petition alleges alcoholism, an approved drug program, as designated in 71.24 RCW if the petition alleges drug addiction, or by an approved mental health center if the petition alleges and mental problem." The appellant's record, thoroughly reviewed by the prosecution, makes it unmistakeably clear that the appellant has both chemical dependency and mental health issues. Multiple assessments by private parties and the Department of Corrections *all* make this the most important issue as the reason for and unless treated, increased probability of future recurrence. Even the appellant's previous sentencing judge recognized these issues and mandated that treatment for chemical dependency and mental health be continued and supervised by the Department of Corrections. As per Washington State's sentencing reform act RCW 9.94A.500, there are additional due process requirements for a defendent with chemical dependency and mental health issues.

3. Yes. RCW 9.94A.340 equal application states "The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the State, without discrimination as to any element that does not relate to the crime or the previous record of the defendant." In a Washington Supreme Court case State v. Harner, which was joined with case State v. Keithley, numbers 74460-2 and 75337-7 (2004), this issue was addressed. Article I, Section 12 says the right to equal protection guarantees that persons similarly situated with respect to a legitimate purpose of the law receive like treatment. RCW 2.28.170 allows for establishment of drug courts in Washington State. Each county may adopt their own, more stringent guidelines for entry in to the program. The guidelines must be applied equally and cannot be denied a certain class of people.
4. Yes. The 2011 legislative session under the Bill ESSB 5891 eliminated the Sentencing Guideline Commission (aka SGC). The Bill relates to criminal justice cost savings measures. In addition, according to the Washington Institute for Public Policy (aka WIPP), the elimination of the SGC will give further discretion to sentencing judges and increase the effectiveness of the criminal justice system, as well as saving money.
5. Yes. Under RCW Section 9.94A, dealing with a defendant's offender score, it is explained that the judge determines the offender's score by consideration of the record, including those things provided by the prosecution. Further, as per 9.94A.500, the court is to consider chemical dependency, mental health issues, a risk assessment report, pre-sentence reports, and a criminal history summary, provided by the prosecuting authority. The defendant is supposed to be provided an opportunity to review and correct all information used by the judge in determining the offender's score. Ultimately, it is within the judge's authority to calculate the offender's score.
6. Yes. In the case *Drum v. State*, S. Ct. 81498-8, a case that began in the same Jefferson County Superior Court, presided over by the Honorable Judge Craddock Verser, and ended up in Washington State Supreme Court, says that RAP 12.2 "The appellate court may reverse, affirm, or modify the decision being reviewed and take any other actions as the merits of the case and the interest of justice may require."

MEMORANDUM

FACTS

Facts Addressing Answer No. 1 and No. 2: Due Process and Equal Protection

The drug court team and a recommendation is presented to the drug court judge. "Further the drug court judge accepts the individual into the program and the defendant pleads guilty to the related charges." The law states that "a screening will be performed to determine if you are eligible and appropriate for admission into the program." All counties in the State of Washington receive authority to establish drug courts from RCW 2.28.170 Drug courts. This statute defines the basic guidelines for admission and eligibility for an offender. However, a local county can make these guidelines stricter. Jefferson County has not made them stricter. The Jefferson county team includes chemical dependency professionals, department of corrections personnel, staff from the prosecutor's and public defender's offices and the presiding drug court judge.

In a *NOTICE OF ISSUE* and a *MOTION & DECLARATION IN SUPPORT OF PETITION FOR DRUG COURT* the appellant's counsel made an argument to the court that included specific reasons as to why the defendant was eligible for and should be considered for the drug court program. These court documents give the specifics of the defendant's case relating to the State Law authorizing drug courts and the Jefferson County drug court policy or law.

It is clear that the initial response from the prosecuting attorney Julie Dalzell, as told to the defendant's public defender Scott Charleton, that the defendant would be allowed to enter drug court. Ms. Dalzell asked the Mr. Charleton to "write it up and she would sign it at the next drug court hearing." The defendant's public defender neglected to bring the document mentioned for approval and signature to court.

A short time later, the defendant was told that the chief prosecuting attorney changed her mind and denied admission to drug court, without a screening or evaluation by the team. Even with this language within the law, defendant was told by the public defender that it is standard practice that admission is decided only by the chief prosecuting attorney; that he/she is the "gatekeeper." The defendant recalls the judge also stated this in open court. The appellant questions this because as the law says that eligibility would be considered by the team of chemical dependency professionals and department of correction personnel. When the defendant questioned the public defender about this denial, the defendant was told it doesn't matter what the law says, "This is the way it is done in Jefferson county."

The defendant, his family, pastor, and the public defender continued to advocate for the his entry into the drug court program. The answers and reasons for denial that were provided by the county prosecutor to these individuals and in writing were erroneous, in direct contradiction to the record, and were ultimately discriminatory. Each time that one of these statements denying the defendant to drug court were made, one of the above persons made responded to the prosecutor.

MEMORANDUM

The Court may have a hard time believing that these were the actual statements and reasons provided by the prosecutor's office for denying access but the appellant can provide proof for each statement made. The documents proving these erroneous and discriminatory statements are not part of the record because no matter how hard the defendant, his family, and his pastor tried to get the defendant's counsel to enter these responses and their proof into the record, the defendant's counsel denied this request. The defendant made repeated efforts to get his counsel to enter proof of the reasons given for denial to drug court into the record for the Court to review; these attempts were all denied; again with the explanation "this is just how it is done in Jefferson County."

The defendant would ask that the Appeals Court review this record including letters from the defendant's pastor, family, and verbal statements made to the defense counsel of record.

Below are the statements made by and given by the prosecution as to why the defendant was being denied drug court despite meeting the requirements of the statue and having the support of the "drug court team" of professionals in chemical dependency and mental health: (note they are presented in the order presented to the interested individuals)

- "Mr. Waldenberg has the same criminal record as Michael J. Pierce and is therefore a danger to the community." Michael J. Pierce had just been found guilty of a double homocide which involved the cold blooded killing and then burning of the victim's home for a total of $300. Mr. Pierce was well known by Jefferson County police and had a lifelong criminal history. The defendant Waldenberg had no history of violence and all of his criminal record occurred in a three month span in Great Falls, Montana. There is no history of violence anywhere in Mr. Waldenberg's record. Defendant's counsel, his pastor, and his family all made efforts to correct this statement by the prosecution.
- "All of Mr. Waldenberg's burglaries were residential burglaries." This makes him a far greater danger to the community than if they were committed in unoccupied buildings. The record, and the facts show that NONE of Mr. Waldenberg's past (2003) burglaries took place in or were classified as "residential burglaries." Again, my pastor, my family, and defendant's counsel tried to correct this statement made by the prosecution.
- "Mr. Waldenberg is educated, has a college degree, and comes from a middle class upbringing, and drug court is just not designed for those type of people." Again, defendant's counsel tried to correct the record and explain that chemical dependency and mental health issues do not effect just the poor and uneducated. These issues effect people from all walks of life.
- "Mr. Waldenberg would not make it through drug court. He had been kicked out of the Safe Harbor Drug program." The defendant voluntarily entered drug rehabilitation at Safe Harbor, and after completing phase I was not allowed by Safe Harbor to continue to phase II because he could not provide a letter from his Doctor an exact date when he would be off of the pain medication he was on as a result of a severe motorcyle

accident involving seven surgeries within the span of 14 months. Again, the defendant's family, pastor, and counsel attempted to correct this erroneous statement and reason for denial with the prosecutor's office.

- "Mr. Waldenberg does not have a drug problem and it did not have anything to do with his crime." Safe Harbor treatment center had provided a chemical depency and mental health evaluation which showed just the opposite. Also, after the accident, a series of seven surgies, all requiring the use of pain medication (defendant has a long history of addiction to pain medications), the doctors all said that the defendant simply could not avoid becoming addicted to pain medications with such long term trauma and usage. Again, multiple attempts were made to show the prosecutor's office that this statement and reason for denial was incorrect and the record clearly showed this.

AFTER ALL THE ATTEMPTS TO CORRECT THE RECORD, THE DEFENDANT WAS STILL DENIED DRUG COURT AND DEFENDANT'S COUNSEL REFUSED TO MAKE THESE ARBITRARY DENIALS PART OF THE RECORD AS THE DEFENDANT REQUESTED MULTIPLE TIMES.

In open court, the prosecutor stated that the defendant did not have a drug problem and that for this reason, could not be admitted to the program. This is false and review of the records would show this is false. **No doubt the prosecutor will continue to make this argument and argue for the maximum sentence allowed.**

The defendant made every attempt in writing, emails, and verbally to get his attorney(s) to get the above erroneous statements in the court record to show that I was being denied drug court for personal bias by the prosecution, and not by statutory due process or the facts in the record. **The sentence by the Honorable Judge Macek for the burglaries in Montana makes it mandatory that the defendant continue with chemical dependency and mental health treatment.** From the very beginning, the prosecutor has refused to follow the law as to the required due process when chemical depency and mental health issues are involved in a case;

In ***State v. Young*, 70 Wn. App. 528, 529 856 P.2d. 399 (1993)** the Court states the "criminal defendant is Constitutionally entitled to a recod of sufficient compleness to permit effective appellate review of his or her claim." In this case because of the lack of due process, the record is not "sufficiently complete" because the prosecutor's erroneous, incorrect, and outrageous statements went unchecked or corrected by the defendant's attorney(s). Further the appellant alleges that the prosecution's personal bias (shown in the number of statements made clearly contrary to the actual record), the lack of the statutorily required assessment of a defendant with chemical dependency and mental health issues were not performed not entered into the court record.

In addition to a review as to whether due process was followed, appellant would like the Court to review whether the equal protection clause was properly applied. The appellant contends that the drug court law of Washington State and Jefferson County were not applied equally in this case. In considering whether due process was done in this case, the appellant asks the court to review a precedent setting case in the U.S. Supreme

Court addressing when, and to what degree due process is required; ***Morrissey v. Brewer,*** 408 U.S. 471 (1972). Also please reference State v. Cassil-Skillton 122 Wash. App. 652, Wash. Div. 2 (2004). Further, a review of *State v. Jason G. Meyer*, 192 N.J 421, 930 A.2d 428 (N.J. 2007) states "consistent with the Drug Court Manual , the trial court was vested with the discretion to admit defendant into Drug Court...." show that there are U.S. standards set for drug courts which includes a judges discretion to sentence to drug court. **Jefferson County, Washington Drug Court Policy** states exactly the same, that "Post Conviction, the Judge may sentence the defendant to drug court". **The prosecutor, judge, attorney(s), and the Dept. of Correction personnel all had differening interpretations of this part of the drug court law. Therefore, the appellant asks the Appeals Court to review the law and clarify the intent and letter of this law.**

Facts Addressing Answer No. 3

The applellant addresses most of the applicable due process issues in the answer above to "Fact Addressing Answer No. 1. The cases given for the Appeals Court provided for review mostly address both issues since they are so closely tied. The defendant would like to stress again that the erroneous statements given by the prosecutor's office for denial to Jefferson County Drug Court are contrary to the record, and were brought to the attention of the prosecutor's office by respected members of the community all willing to testify to the statements and reasons given. Further, by initially agreeing to the defendant's placement in the drug court program and then later denying access without a full review and an attempt to correct the record, places the appellant in a class of people whose liberty is at stake, and for which the laws of the state make clear should be addressed in the same manner as someone with an illness or disease. By not doing any of the above, the prosecutor's office, and the defendant's counsel denied the necessary due process established in case law and state statute. **The appellant would also like the Appeals Court to review the Jefferson County Drug Court Law that states the Judge can sentence the defendant to Drug Court.** In not even considering the fact that this is clearly stated in the law violates the required due process due the defendant. If the Drug Court policy states this, then why was it not considered by the court?

Facts Addressing Answer No. 4

REVIEW OF NEW LAW ELIMINATING OF GUIDELINES COMMISSION

Another major point that the appellant would like the Court to review is the change to the Washington State Sentencing Guidelines Commission d/b/a SGC. It is obvious from the court transcripts and discussions in open court, that the Honorable Judge Craddock Verser made statements that he tried to give me a downward departure in my sentence and after reviewing all the evidence, made the statement, "prison is the last place you need to be, or where I want to put you." However, the judge felt his hands were tied by the Sentencing Guidelines. Effective July 1, 2011, Washington Congressional law

MEMORANDUM

ESSB 5891 eliminated the Sentencing Guidelines Commission. In review of all the publications by the Washington Institute for Public Policy d/b/a WIPP, the intent of the Legislature in changing this law, was to grant greater discretion to sentencing judges. WIPP gave many reasons. The two that stood out the most were reducing costs for the the entire criminal justice and increasing the effectiveness of sentencing judges. Appellant's research of WIPP and the intent of the elimination of SGC might provide the Honorable Judge Craddock Verser the ability to offer a "downward departure." Appellant would respectfully ask the Court to make a ruling on the Honorable Judge Craddock Verser's ability to offer the "downward departure" that he wanted to give, in light of the recent elimination the SGC. Appellant's attorney did not address the effect this new law might have on this case.

The appellant would ask the Appellate Court to review both the intent and letter of this newly enacted law (July 20111) as it relates to this case. Most important, according to the point of view of the appellant is that the trial Judge expressed in open court a willingness to find any option available to depart from the sentencing guidelines. Yet, the fact that this "Post Conviction" option clearly stated in the Jefferson County Drug Court law was not even considered because the parties involved all had different opinions as to the meaning of this part of the law. **The appellant respectfully requests that the Appeals Court review this part of the law and make a determination as to its meaning, or if in fact this part of the law is also vague enough to make it unenforceable and therefore applied arbitrarily.**

In addition, the appellant would ask the Appeals Court to examine the effect that the elimination of the Sentencing Guildeline Commission has on the discretion of the trial court and the Honorable Judge Craddock Verser. The appellant, upon reviewing the law itself and the many subsequent legal opinions, asserts that the trial Judge has been given much greater latitude in giving "exceptional sentences" and "downward departures" from the sentencing guidelines. **Please review ESSB 5891, the intent of this law (increased rehabilitation and decreased spending on incarceration), and the effect of judicial discretion.**

Facts Addressing Answer No. 5

The record will clearly show that the trial judge did not review the criminal history, and never determined an official offender score. The trial judge only relied on the score that was put forth by the prosecution. From the very beginning of this case, the defendant tried to get his attorney(s) to correct the obvious and provable errors in the criminal history, and the obvious errors made in calculation by a biased and overzealous prosecution. The defendant's counsel was unwilling to do so and make this part of the court record. Despite given proof of the incorrect criminal history the defense attorney(s) would not present this to the prosecutor's office nor to the court record. The judge was never given the chance or to even consider the intent or letter of the "merger doctrine" which can be used by a trial judge at his or her discretion. The appellant alleges this is in clear violation of statute and had a dramatic effect on the sentencing discretion the trial Judge had in this case. The applellant begs the Appeals Court to review whether it

is acceptable for a judge to use the offender score provided by the prosecutor's office or if the judge carries this responsibility. The appellant alleges that statute makes clear that the judge determines the offender score, and if found necessary the "merger doctrine" may be applied. **Please see *State .v Freeman,* 153 Wn. 2d. at 772.** Further, the trial Judge was never given the chance to consider the defendant's criminal history as required by Washington statute. ***State v. Johnson,* 125 Wn. App. 443, 457, 105 P. 3d 85 (2005)** found that because of this insufficient review by the trial judge that "this is a claim of constitutional error, we review the alleged error de novo." Also see ***State v. Tyrrell*, a 2004 case that began in the Superior Court of Jefferson County and ultimately went to the Washington Supreme Court.**

Facts in Answer to Answer No. 6

"Exceptional sentences" that allow for a "downward departure" by the trial court Judge are established in "Departure from Guidelines in RCW 9.94A.535. If the "mitigating circumstances" required are present, the judge may depart from the guidelines. Further, since the elimination of the Sentencing Guideline Commision in ESSB 5891 in July of 2011 the discretion of the trial Judge to provide for these sentences has increased and is more acceptable within the law.

Further, the appellant asks the Appellate Court to consider RCW 10.05 in light of the fact that Drug Court Sentences are much like deferred prosecutions, and therefore the above statute applies as well in what the Judge may consider for sentencing.

I apologize for the length of this document, but this is the last chance at a life of any meaning. The importance of what I have been fighting throughout this case; to get my attorney(s) to correct the record, respond to the prosecution's errorneous and biased information and statements, and get the above into the court record so the trial judge could consider them in his sentencing cannot be emphasized enough. The trial court transcript will show that the Honorable Judge Craddock Verser said " the last place he wanted to send me was prison. That this would do no good." And yet the Judge Verser said that the sentencing guidelines would not allow him to do anything else. The appellant believes a complete review of my attorney's brief, and these additional issues brought forth by the appellant will lead the Appellate Court to make a decision otherwise.

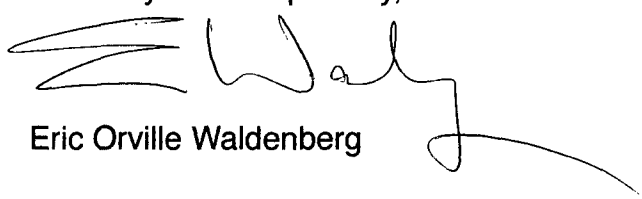
I must add one other thing that is hard for me to say. I think very highly of Judge Verser. The community thinks very highly of Judge Verser. As uncomfortable for me as it is, I must inform the Appellate Court that Judge Verser is not in the best of health and there are those that worry he will not be able to hear my case if it were to come back to him. We all hope this is not the case and that he makes a recovery.

I would like to express to the Appellate Court that if this case is remanded back to Jefferson County Superior Court and a temporary judge ends up hearing this case, I will have no chance at anything other than the 5 year sentence which pretty much brings my life to an end, and all that I have worked for to recover is made moot. If it is at all

possible the appellant asks that the Court make a decision that will not require another decision by the trial court, and instead makes a decision that will allow the appellant to continue employment, chemical depency recovery, mental health treatment, and all the other things he has done to become a fully contributing citizen.

The prosecutor will argue that I do not have a "drug problem", that "the prosecutor does not make the sole decision who get access to drug court", and that the appellant's "addiction problem has been cured", that the appellant does not qualify for a downward departure, and worst of all "that the Court cannot take into account any good that the appellant has done after the crime." The prosecution, again will state that the appellant was "not successful at Safe Harbor Treatment Center." This is patently incorrect. The appellant was not allowed to move to the next phase of treatment due to lack of a Doctor's note regarding an exact date for treatment for chronic pain by medication. The appellant then transferred to another addiction treatment center in Kitsap County and successfully completed that treatment program. As all honest professionals in the chemical depency and mental health fields are aware, a person is not "cured of addiction" nor do the effects of mental health issues. **The appellant's hope is that these arguments made by the prosecution will be seen with the bias and prejudice that is inherent in them.**

Sincerely and Respecfully,



Eric Orville Waldenberg